



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

02

PUBLIC COPY

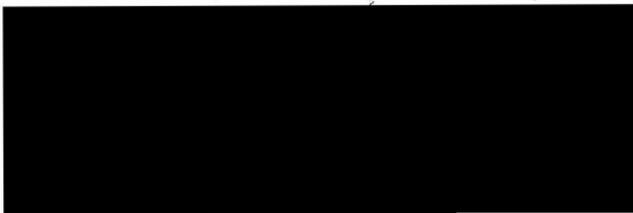


FILE: EAC 04 077 50218 Office: VERMONT SERVICE CENTER Date: MAR 30 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemany, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a bakery outlet management company that seeks to employ the beneficiary as a marketing manager and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the position is not a specialty occupation. On appeal, the counsel submits a brief and additional evidence.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any bachelor's or higher degree, but one in a specific field of study that is directly related to the proposed position.

The record of proceeding before the AAO contains, in part: (1) Form I-129 with supporting documents; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; (5) Form I-290B with accompanying brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner lists the proposed position as a marketing manager. Evidence of the beneficiary's duties includes the Form I-129 with accompanying employer support letter, the response to the RFE, and additional evidence submitted with the appeal. The duties of the proposed position entail, in part:

1. evaluating and determining ideal marketing programs to ensure broad-based coverage of growth markets;
2. establishing research methodology and design formats for data gathering, including financial and statistical surveys, opinion polls, and/or questionnaires;
3. reviewing and analyzing financial/statistical data to forecast marketing trends;
4. establishing market analysis and business forecasts for various areas including demographics, target markets, and regions;
5. directing and coordinating activities involved with the production, sale, and distribution of the petitioner's products;
6. determining the variety and quantity of products to be produced, according to orders and sales projections;
7. developing a budget for operation, utilizing experience and knowledge of current market conditions;
8. directing sales activities, following standard business practices;
9. planning product distribution with customers and negotiating with suppliers to arrange purchase and delivery of supplies; and
10. implementing policies to utilize human resources, machines, and materials productively.

The director found that the proposed duties reflected those of a marketing manager and concluded that the proposed position did not meet any of the four criteria for classification as a specialty occupation.

On appeal, the petitioner asserts that the director erred in denying the petition and that the proposed position meets the first criterion at 8 C.F.R. 214.2(h)(4)(iii)(A).

The petitioner need only satisfy one of the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) to show that a position is a specialty occupation. Upon a thorough review of the record, the AAO finds that the petitioner has not established any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proposed position is not a specialty occupation.

To determine whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge as required by the Act.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties of particular occupations. Based on a thorough review of the duties of the proposed position alongside the *Handbook's* description of several occupations, the AAO finds that the proposed duties reflect those of a marketing and sales manager. The *Handbook* states that marketing managers develop a firm's marketing strategy in detail, identify potential markets, develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied, monitor trends that indicate the need for new products and services, and oversee product development. These duties mirror the proposed duties of "evaluating and determining ideal marketing programs" and "reviewing and analyzing financial/statistical data to forecast marketing trends." Sales managers analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and to monitor customers' preferences. These duties reflect the proposed duties of "determining the variety and quantity of products to be produced, according to order and sales projections" and "directing sales activities."

To determine whether the position is a specialty occupation, the AAO first turns to the first criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) - a bachelor's or higher degree, or its equivalent, in a specific field of study is normally the minimum requirement for entry into the particular position - the AAO turns to the *Handbook's* discussion of the educational requirements for marketing and sales managers:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous.

The *Handbook* indicates that entry into positions in this occupation do not normally require specific bachelor's degrees. Employers consider those with liberal arts degrees and relevant work experience suitable for jobs in these areas. Employers prefer, but do not require, marketing and sales managers to possess bachelor's degrees in specific fields of study. The *Handbook* also notes that many employers fill marketing and sales management positions by promoting experienced staff or related personnel. As no specific course of study is required for entry into this occupation and those without specific bachelor's degrees or without bachelor's degrees can be promoted to marketing and sales manager, the petitioner fails to establish that a bachelor's or higher degree in a specific field of study is the normal minimum requirement for entry into the proposed position.

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether or not letters or affidavits from companies or individuals in the industry attest that such companies "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). The petitioner asserts that similar organizations in its industry require business-related bachelor's degrees for positions similar to the instant position. The petitioner did not submit letters or affidavits from

companies or individuals in the industry. Instead, the petitioner submitted six job announcements for positions the petitioner asserts are similar to the proposed position.

These job announcements are not sufficient to establish an industry-wide marketing bachelor's degree requirement for parallel marketing/sales manager positions among similar bakery outlet management companies. The job announcements are distinct from the instant position in several significant ways. For example, Firmenich is neither similar in size nor in scope to the instant petitioner. There, the employer, a company with headquarters in Geneva, is a creator and manufacturer of specialty chemical, flavors, and perfumery with an international reputation. For its Savory Group position, the employer required a bachelor's and preferred a master's degree in food science. Here, the petitioner manages bakery outlets in New Jersey and requires a bachelor's degree in marketing. In the job announcement by Strato, the petitioner, a supplier of air brake products, did not require a specific bachelor's degree but preferred one in engineering. Counsel asserts that the director erred in finding that the petitioner is a single donut shop and asserts that the petitioner has 26 outlets and employs 313. The tax documents submitted do not support this assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has submitted no other evidence to support its assertion that a specialized degree requirement is common to the industry in parallel positions among bakery outlet management companies similar to it in size and scope. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the employer normally requires at least a bachelor's degree or its equivalent, in a specific field of study, for the position. To determine whether a petitioner has established this criterion, the AAO generally reviews the petitioner's past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. In the instant case, this criterion is not a factor as the petitioner has not submitted evidence to establish a consistent history of hiring individuals with specialized degrees for similar positions.

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position. A petitioner satisfies the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific field of study. The duties of the proposed position, as described by the petitioner, do not establish a requirement for a higher degree of knowledge and skill than would normally be required of marketing or sales managers equipped with less than a bachelor's degree level of knowledge. Counsel asserts that the knowledge needed to perform the duties of can only be acquired through a bachelor's degree in a business-related field. The record, however, lacks evidence that substantiates that the combined duties, as described by the petitioner, are so complex or unique that they can only be performed by an individual with a degree, or that they are so specialized and complex as to

require knowledge usually associated with the attainment of a bachelor's degree or higher in a business - related field. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*.

No evidence contained in the record demonstrates that the proposed position is a specialty occupation.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.